Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
ORANGE CRUSH RECYCLE, LP	)	Call signs: WSP84, WSP87,
Licensee of Private Operational Fixed	)	WNEM637, and WNEV293
Microwave Stations	)	
	)	
Request for a Determination of Inapplicability of	)	
Rule Section 101.65(a) or, in the Alternative,	)	
Request for Waiver	)	

ORDER

Adopted: August 21, 2009 **Released: August 25, 2009**

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 19, 2007, Orange Crush Recycle, LP (Orange Crush) filed a Request for a Determination on Inapplicability of Rule Section 101.65(a) (Request) or, in the Alternative, Request for Waiver (Waiver Request) (collectively, the Requests).[1] For the reasons explained below, we deny the Request[2] and dismiss the Waiver Request as moot.

II. BACKGROUND

2. Orange Crush states that it operated a 2 GHz band fixed point-to-point microwave (FS) system[3] continuously from 1972 "until about December 2006" that served as the backbone that networked its land mobile radio stations in the Chicago, Illinois area.[4] The Commission's licensing records reflect that Orange Crush holds FS licenses for four sites[5] that, for convenience, we will refer to as the "North

[1] Orange Crush Recycle LP, Request for a Determination of Inapplicability of Rule Section 101.65(a) or, in the Alternative, Request for a Waiver (filed Jul. 19, 2007) (Requests).

[2] We are considering the Request as a declaratory ruling under 47 C.F.R. § 1.2.

[3] *See* Requests at 1. Orange Crush states that the microwave system was first licensed, under call signs WSP84 and WSP87, and constructed in 1972. *Id.*

[4] *Id*. at 1-2. Orange Crush states that it operates 11 two-way, 470-512 MHz band ("T-band) channels for internal communications purposes in operating one of the largest road construction and highway transportation businesses in the state of Illinois—routinely dispatching approximately 160 vehicles each day over a 150 mile radius of Chicago, Illinois into Wisconsin. *Id. See also* Reply of Orange Crush to Opposition of T-Mobile at 2 (filed Sept. 4, 2007) (Reply).

[5] *See, e.g.*, Reply at 2.

site," the "East site," the "South site," and the "Control site."[6] In "about December of 2006," Orange Crush states that it "dismantled its microwave equipment" and "stored it at its office location"[7] after receiving notice "[o]n or about June of 2006" that the rooftop leases for the "[Control site] location for the . . . microwave system would terminate in December 2006.[8]

3. T-Mobile USA, Inc. (T-Mobile) is the licensee of Advanced Wireless Services (AWS) licenses in the Chicago metropolitan area. Under the Commission's Rules, prior to operating in a given area, AWS licensees must pay the costs of relocating primary, incumbent FS operations to "comparable facilities."[9] Once an AWS licensee commences negotiations with a given FS licensee, both parties are required to negotiate in good faith, which requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process.[10]

4. Orange Crush states that T-Mobile approached it in December 2006 to initiate such negotiations and that Orange Crush informed T-Mobile that it was in the process of relocating its 2.1 GHz equipment due to the loss of the Control site lease.[11] According to Orange Crush, both parties agreed that it would be wasteful for Orange Crush to physically relocate its 2.1 GHz system given that it would need to be cleared out of the 2.1 GHz band to accommodate T-Mobile's AWS operations.[12] As such, according to Orange Crush, both parties agreed that Orange Crush should construct its relocated microwave system pursuant to the agreement it would negotiate with T-Mobile.[13] Thereafter, Orange Crush claims that it negotiated in good faith with T-Mobile until May 17, 2007, when T-Mobile withdrew from negotiations and notified Orange Crush that T-Mobile considered call signs WSP84 and WSP87 to be non-operational and automatically cancelled under Section 101.65(a) of the Commission's Rules, which provides that a microwave license will be automatically forfeited upon voluntary removal or alteration of the facilities that renders the station not operational for a period of 30 days or more.[14]

5. On July 19, 2007, Orange Crush filed the instant Request, which asks the Commission to find that Section 101.65(a) is inapplicable to Orange Crush's situation. Alternatively, Orange Crush seeks a waiver of Section 101.65(a). Opposing the Request, T-Mobile states, among other things, that it repeatedly sought to inspect the FS facilities and negotiated in good faith for several months until Orange Crush revealed that its FS facilities had been dismantled.[15] Furthermore, T-Mobile avers that Orange

[6] The North site is call sign WNEV293, from which transmissions were received at the East site. The South site is call sign WSP87, from which transmissions were also received at the East site. The East site is call sign WSP84, from which transmissions were received at the North site, the South Site, and the Control site. The Control site is call sign WNEM637, from which transmissions were received at the East site.

[7] Requests at 2.

[8] Orange Crush explains that the new building owner had elected to terminate the lease for microwave equipment atop the building, and that Orange Crush had 6-months in which to remove the equipment. *Id.* at 2.

[9] *See, e.g.*, 47 C.F.R. § 101.69 (Transition of the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands from the fixed microwave services to personal communications services and emerging technologies).

[10] *See* 47 C.F.R. § 101.73(b) (Mandatory negotiations).

[11] Requests at 2-3.

[12] Requests at 3.

[13] *Id*. at 3.

[14] *Id*. at Exhibit C (Letter dated May 17, 2007, to Mr. James Lombardo, Orange Crush Recycle, L.P., from Shannon Reilly Kraus, Corporate Counsel, T-Mobile, at 1 *quoting* 47 C.F.R. § 101.65(a). T-Mobile also requested that Orange Crush file the necessary documents with the Commission to cancel the licenses by June 7, 2007, or T-Mobile would inform the Commission of the alleged operational status of the two call signs.

[15] T-Mobile USA, Inc., Opposition to Request (filed Aug. 20, 2007) at 2-3 (Opposition).

Crush was responsible for complying with the Commission's Rules including the automatic cancellation provisions of Section 101.65.[16] Replying to T-Mobile's Opposition, Orange Crush states, among other things, that it "generally agrees with the facts detailed in T-Mobile's Opposition, but disagrees as to the timing and perception taken by T-Mobile regarding these facts."[17]

6. On August 20, 2008, NGEN Wireless filed a letter seeking enforcement of Section 101.65 to cancel, in whole or in part, Orange Crush's licenses for non-operational paths between the South site and East site and between the East site and the Control site.[18] In view of the overlap in subject matter, we served the NGEN Letter on Orange Crush and T-Mobile and added it to the record of the instant proceeding. We also served pleadings filed in the instant proceeding, to date, on NGEN Wireless.[19]

III. DISCUSSION

A. Declaratory Ruling Regarding Applicability of Section 101.65(a)

7. Section 101.65(a) of the Commission's Rules[20] states:

> In addition to the provisions of § 1.955 of this chapter, a license will be automatically forfeited in whole or in part without further notice to the licensee upon the voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more.

In this case, Orange Crush contends that the non-renewal of the rooftop lease at the Control site necessitated the forced removal of its microwave equipment[21] because "[t]he Licensee was left with no choice but to remove the equipment as ordered by the new owner."[22] Orange Crush avers that the non-operation of its facilities for more than 30 days was involuntary and that Section 101.65(a) of the Commission's Rules, which governs voluntary removal of facilities, is therefore inapplicable.[23]

8. We disagree. First, Orange Crush does not even allege that it was ordered by the owner(s) of the East site (WSP84) or the South site (WSP87) to remove the FS equipment that comprised the point-to-point path that was authorized on the frequency pair that T-Mobile sought to clear. The Commission's records reflect that the Control site was the transmit site for Orange Crush's license under

[16] *Id.* at 4-6.

[17] Orange Crush Recycle LP, Reply of Orange Crush to Opposition of T-Mobile (filed Sep. 4, 2007) at 1 (Reply).

[18] Letter dated August 20, 2008, to Kathryn S. Berthot, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC, from Mark Carter, NGEN Wireless (NGEN Letter). NGEN Wireless states that it filed the letter on behalf of Cricket Communications and Denali Spectrum Operations LLC, two AWS licensees in the Chicago area. *Id*. at 1.

[19] E-mail dated Feb. 11, 2009, to Elizabeth R. Sachs, Esq., Eric W. DeSilva, Esq., and Mark W. Carter, from Peter Daronco, Associate Chief, Broadband Division, WTB. We also noted that any future filings with the Commission related to this subject matter must be served on all parties because NGEN Wireless, along with Orange Crush and T-Mobile, are parties to the instant proceeding for purposes of the *ex parte* rules. *Id*.

[20] 47 C.F.R. § 101.65(a).

[21] Requests at 5.

[22] *Id.*

[23] *Id.*

call sign WNEM637[24] and one of three sites that received the East site. Apparently recognizing this factual gap,[25] Orange Crush explains "that when one path or hub in a microwave system is taken down, the entire network is affected,"[26] While we have no quarrel with this statement generally, we find no basis for concluding that the arguably involuntary removal of the Control site somehow rendered involuntary Orange Crush's decision to dismantle the North site, the South site, and the facilities at the East site that did not transmit/receive from the Control site.

9. Next, Orange Crush states that it received notice that the Control-site lease would not be renewed fully six months before its microwave equipment needed to be removed.[27] Under these circumstances, we conclude that Orange Crush has not established that the removal or alteration of the Control site facilities—much less the facilities at the other three sites—was involuntary under Section 101.65(a). As the Commission has previously held, non-renewal of a lease does not constitute an involuntary action.[28] We therefore conclude the removal of the microwave equipment was voluntary under Section 101.65(a).

10. Orange Crush also contends that private internal microwave users are subject only to Section 101.65(b), which provides that a station not operated for one year or more is considered permanently discontinued, in which case the licensee must cancel the license. Orange Crush avers that the 30-day provision of Section 101.65(a) applies to the operations of common carriers because prior to the *Part 101 Proceeding*, the 30-day provision governed common carriers under Part 21 whereas the one-year provision governed Private Operational Fixed Services (POFS) under Part 94.[29] Moreover, Orange Crush contends that it is incongruent for both paragraphs (a) and (b) of Section 101.65 to apply to all microwave licensees regardless of regulatory status: "[e]ither permanent discontinuance resulting in automatic cancellation is a result of an act or inaction 30 days in length or 12 months in length, but cannot be applicable simultaneously."[30]

11. We disagree. First, as discussed above, Orange Crush has not established that the removal of the microwave equipment—from the Control site or the other sites—was involuntary. Hence, Orange Crush's claims in this regard provide no justification for granting the Request. Next, we reject Orange Crush's claim that Section 101.65(a) is inapplicable to private microwave services and/or that Section 101.65 is incongruent. Orange Crush's claim that POFS licensees are governed only by the one-year provision (§ 101.65(b)) is misplaced because Section 101.65 makes no distinction between POFS and common carriers, except that paragraph (b) cross references additional requirements for common

[24] Orange Crush identifies the "control location," as well as the address of its business operations, as 222 North LaSalle Street, Chicago, IL, 60601 (the Control site). *Id*. at 2. Although Orange Crush references WSP84 (the East site) and WSP87 (the South site) in the caption of the Request and states that the Control site is Location 1 for both licenses, the Commission's records reflect that the Control site is a receive location (Location 3) for WSP84 but neither a transmit nor a receive location for WSP87. The Control site is Location 1 (the transmitter location) of Orange Crush's call sign WNEM637, which lists WSP84's transmit site (the East site) as its only receive site.

[25] Opposition at 4-5 (the Request focuses on call signs WSP84 and WSP87, which includes the path that T-Mobile sought to clear, even though that path (between the East site and the South site) did not include the Control site).

[26] Reply at 3.

[27] Requests at 2.

[28] *See* In re Application of K.U.T.E., Inc. for Construction Permit and Waiver of 47 C.F.R. § 73.211(c) Station KUTE (FM), Glendale, California, *Order*, 1 FCC Red 938 (1986).

[29] *Id*. at 6-8.

[30] *Id*. at 7-8.

carriers.[31] Moreover, Orange Crush acknowledges that the Commission established Part 101 to unify the Commission's rules governing all microwave services.[32] Nor is Section 101.65 internally inconsistent: paragraph (a) is applicable when previously constructed and operational facilities are physically removed or altered so as to render a station not operational for 30 days or more, and paragraph (b) is applicable when facilities that remain capable of operation are in fact not operated for one year or more. In all events, given that the microwave equipment was removed in "about December 2006,"[33] Orange Crush's contention that Section 101.65(b) should govern rather than Section 101.65(a),[34] became moot one-year later when Orange Crush had taken no steps to restore its FS operations by modifying its facilities as necessary due to the termination of its lease for the Control Site.[35] In this connection, at no time since learning in June 2006 that its Control site would be unavailable after December 2006, has Orange Crush sought new or modified authority for a replacement control site (or otherwise resumed operating the dismantled point-to-point links).[36] Orange Crush suggests its inaction stems from efforts to determine the best substitute for its microwave stations, such as T1 lines, and a need to expend financial resources on construction supplies and tools.[37] But, "[b]oth the Commission and the courts have consistently held that the consequences of independent business decisions do not release a licensee from its responsibilities to implement its stations in accordance with the Commission's Rules."[38]

12. Regarding T-Mobile, we note that the Commission's rules governing the transition of the 1850-1990 MHz, 2110-2150 MHz, and 2160-2200 MHz bands from fixed microwave services to emerging technologies require emerging technology (ET) licensees to relocate *existing* fixed microwave

[31] *See* 47 C.F.R. § 101.65(b) *citing* 47 C.F.R. § 101.305. To the extent that Orange Crush seeks a determination that Section 101.65(a) is or should be inapplicable to private microwave licenses, we would view such a request as an untimely petition for reconsideration or impermissible collateral attack against the rules adopted in the Part 101 Proceeding over eight years ago. *See* 47 C.F.R. § 1.429(d), which requires a petition for reconsideration to be filed within 30 days from the date of public notice of the action. "[I]ndirect challenges to Commission decisions that were adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied." Motions for Declaratory Ruling Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services, *Memorandum Opinion and Order*, 14 FCC Rcd 12752, 12757 ¶ 11 (1999), citing MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., *Memorandum Opinion and Order*, 5 FCC Rcd 216, ¶ 41 n. 38 (1990), recon. denied, 5 FCC Rcd 3462 (1990), appeal dismissed *sub nom*. Mountain States Tel. and Tel. Co. v. FCC, 951 F.2d 1259 (10th Cir. 1991) (*per curium*).

[32] Requests at 7, *citing* Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish A New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-118, *Memorandum Opinion and Order and Notice of Proposed Rule Making*, 15 FCC Rcd 3129 (2000) (*Part 101 Proceeding*).

[33] *See* note 8, *supra*.

[34] Requests at 8.

[35] *See* 47 C.F.R. § 101.65(b). A station that has not operated for one year or more is considered to have been permanently discontinued operations and must be cancelled by the licensee.

[36] Our licensing records reflect that Orange Crush filed no applications for special temporary authority, new, or modified facilities anytime after June 2006. *See also* NGEN Letter at 1 (stating that the FS links were observed to be non-operational over a 14-month period).

[37] Reply at 4.

[38] In the Matter of Applications of Winstar Wireless Fiber Corporation and New Winstar Spectrum, LLC, Request for Waiver of Sections 101.55(a), 101.63(a), 101.65(a) and (b), and 101.305(a) and (d) of the Commission's Rules, *Order*, 17 FCC Rcd 7118, 7126 (2002), citing Associated Information Services Corporation Requests for Declaratory Ruling and Waiver and Extension of the Multiple Address System Construction Provisions of Section 94.51(a) of the Commission's Rules, *Memorandum Opinion and Order and Declaratory Ruling*, 3 FCC Rcd 5617 (1988) citing *P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984); see also *Texas Two-Way, Memorandum Opinion and Order*, 98 FCC 2d 1300 (1984), aff'd *sub nom*. *Texas Two-Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985).

services.[39] By dismantling and removing the microwave equipment for their stations, Orange Crush forfeited their licenses under the Commission's rules. Hence, no existing, primary licenses exist for T-Mobile or other ET licensees to relocate or protect.

B. Alternative Request for Waiver

13. Orange Crush pleads in the alternative that the arguments made for the declaratory ruling would also justify a waiver of the rules. However, Section 8 of the Communications Act of 1934, as amended, 47 U.S.C. § 158, which is implemented by Section § 1.1102(5)(q) of the Commission's rules, requires a filing fee for private microwave waiver requests[40] and Orange Crush did not tender this fee. Under the Commission's rules, filings accompanied by insufficient fees or no fees, will be billed for the amount due and 25 percent penalty if the discrepancy is not discovered until after 30 calendar days from the receipt of the application or filing by the Commission.[41] In this case, however, we believe the Waiver Request is moot because we have fully addressed Orange Crush's Request for Declaratory Ruling, which did not require a filing fee. Accordingly, we are dismissing the Waiver Request as moot.

IV. CONCLUSION AND ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.2, 1.955 and 101.65 of the Commission's Rules, 47 C.F.R. §§ 1.2, 1.955, 101.65, the Request for a Determination on Inapplicability of Rule Section 101.65(a) filed by Orange Crush on July 19, 2007, is DENIED.

15. IT IS FURTHER ORDERED that the Alternative Request for Waiver of Rule Section 101.65(a) filed by Orange Crush on July 19, 2007, is DISMISSED without prejudice.

16. IT IS FURTHER ORDERED that the licensing staff of the Broadband Division SHALL TERMINATE the authorizations for Stations WSP84, WSP87, WNEM637, and WNEV293 in accordance with this Order and the Commission's Rules.

17. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Blaise A. Scinto
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[39] *See*, 47 C.F.R. § 101.69, emphasis added.

[40] *See* 47 C.F.R. § 1.1102(5)(q). *See generally* 47 C.F.R. § 1.1102 (Schedule of charges for applications and other filings in the wireless telecommunications services).

[41] *See, e.g.,* 47 C.F.R. § 1.1116(b).